In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1933

UNITED STATES OF AMERICA, APPELLANT

v.

CITIZENS AND SOUTHERN NATIONAL BANK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES

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1. Appellees have mischaracterized the Sherman Act issues in this case. The government's claim that the relationships between C&S and the five percent banks constitute a *per se* violation is not based solely on exchanges of information between C&S and those banks, but on an agreement between C&S and the five percent banks which eliminates all competition between them.

Appellees argue that no such agreement has been shown; that even if proved, its legality under the Sherman Act must be tested by the rule of reason; and that since C&S's purpose in participating in this arrangement was pro-competitive, any agreement is therefore reasonable and does not violate the Sherman Act. Yet appellees concede that there never has been any real competition between C&S and the five percent banks (Br., p. 72, n. 64), and that this condition resulted from the banks' course of conduct, which included voluminous exchanges of information and reviews of past, present and future prices and marketing practices (Br., pp. 11-13).

These concessions confirm the government's contention, which it has consistently maintained throughout this litigation, that the elaborate arrangement sponsored by C&S was a cartel—a horizontal agreement among direct competitors—that eliminated all meaningful competition among these legally independent banks. In view of the other evidence showing the banks' voluntary submission to C&S's plan (United States Br., pp. 9-11, 32-36), the government established the allegation in the complaint (App. 17-18) that C&S and the five percent banks "jointly determined the competitive strategy" of the latter. This arrangement depended in significant part on the exchange of information, including information about future price moves, between and among the defendant banks. But, contrary to appellees' assertions, the exchange of information is only one aspect of the Sherman Act violation charged and proved: the elimination by agreement of all meaningful competition between what otherwise would be independent competitive entities.

The record refutes appellees' allegations that "[w]ith respect to the Sherman Act, the government offered no evidence except communications between C&S and the five percent banks" (Br., p. 21), and that there was no proof of any agreement not to compete or to charge the same prices. In addition to the specific examples we have previously described (United States Br., p. 11, n.2), there is other evidence showing price-fixing. For example, in 1969 the President of C&S Chamblee wrote to C&S asking if it had any objection to C&S Chamblee raising its interest rate on regular savings accounts from 3½ percent to 4 percent in order to meet competition and prevent loss of deposits (GX 149, not printed). Chamblee's President, Mr. Harris, discussed this matter with C&S, and Chamblee did not raise its rate to meet the competition (GX 206; DX 302,

App. E-840, E-855).[1] Since an independent firm ordinarily would not refrain from taking action it deems necessary to protect its competitive position, the inference is compelling that it did not raise its rate in this instance because of C&S's objection.

Appellees' discussion of intra-enterprise conspiracy (Br., pp. 50-53) is wide of the mark. Since the defendants are legally separate and independent corporate entities, they

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[1]GX 206, which is Harris' deposition, is not printed in the appendix. The pertinent portions are as follows:

> Q. Do you recall sending this particular letter to Mr. Ingram?
> A. (Nods head affirmatively.)
> Q. Did Mr. Ingram reply to the letter?
> A. We had some meetings downtown about it. We discussed what we really were looking at. Whatever the letter said, we discussed it in detail, and we made some changes resulting from that.
> Q. Did you at that time increase your interest rate on regular savings accounts from 3 1/2 to 4?
> A. No sir. We put a heavy selling program on 5 percenters and made the regular savings easier. [GX 206, p. 44.]
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> * * * * *
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> Q. You felt pretty strongly at this time about going from 3 1/2 to 4 percent on regular savings accounts, didn't you?
> A. (Nods head affirmatively.) [*Id.* at p. 45.]
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> * * * * *
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> So I'm butt-headed, but if somebody can show me a reason to change my mind, I'll change it. I changed my mind.
> Q. Why did you ask Mr. Ingram if he had any objection to your going to 4 percent?
> A. Because they do all the computation work down here on savings. The computer work on savings is done downtown.
> Q. In what way would the going from 3 1/2 to 4 affect the computer operation?
> A. Well, I think in asking him and talking with him like this it goes back to this original basis that I believe that C&S has the best thoughtout banking system, and I wanted to put my thoughts forward in as forceful a way as possible. And if after consultation they can show me where they've got a better method of operation, I'm willing to adopt it. And that's what occurred. [*Id.* at pp. 46-47.]

resemble a unified enterprise only to the extent that members of any illegal cartel do. The five percent banks are required to price independently precisely because they are *not* legally sub-parts of a single economic enterprise. For this reason, appellees' reliance on statements by Department of Justice officials concerning the application of the intra-enterprise conspiracy doctrine to bank holding companies is misplaced.[2]

Appellees' contention that because their arrangement eliminates *all* competition, it must be tested under the Sherman Act's rule of reason, is anomalous. In effect, they are arguing that because the anticompetitive arrangement among C&S and the five percent banks was so complete, its very scope puts it beyond the *per se* rules, since the banks' cartel arrangement is a kind of *de facto* merger. Thus, even though the five percent banks retain legal independence, appellees contend that their arrangement with C&S eliminating all competition should not be tested under the traditional standards governing such anticompetitive actions.

This claim stands the *per se* doctrine on its head. Under appellees' theory, particular forms of elimination of competition, such as price fixing and division of markets, would be *per se* illegal, but the broader elimination of all competition would be tested by the less stringent rule of reason. No decision of this Court supports such an anal-

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[2]The letter described in n. 42, p. 52, of appellees' brief confined its analysis to subsidiary banks in the normal corporate sense of the word. Thus, the textual reference to which the quoted footnote was attached states: "This [conclusion] is true, of course, only where the holding company owns a substantial majority of the stock in all banks involved." Contrary to appellees' statements, the Department has never taken the position that where a single bank holding company does not hold a majority of the stock of banks that fix prices, such price-fixing is not *per se* illegal.

ysis.[3] It is inconsistent with the basic assumption of the Sherman Act—that legally independent business entities must function in the economy as independent decision makers, in order to preserve the diversity of firms necessary to make the competitive system work.

Appellees contend (Br., pp. 35-42) that their arrangements with the five percent banks were pro rather than anticompetitive because they enabled C&S to bring necessary and important banking services to the suburban areas that the five percent banks serve. There is nothing to indicate, however, that the five percent banks would not have been organized and would not have grown if, instead of operating them as *de facto* branches, C&S had merely assisted in their organization and permitted them to develop as fully independent competitive entities. Nor is there any reason to conclude that, if C&S had not itself "sponsored" these new banks, the demand for banking services in the suburbs would and could not have been met by the organization by people in those communities of local banks that would not be affiliated with C&S. In short, C&S's operation of the independent five percent banks as *de facto* branches was neither necessary or appropriate as a method of increasing bank competition in the areas those banks served—although it undoubtedly was highly beneficial to C&S itself.

2. Appellees also misconceive the Clayton Act issues in this case. As shown in our main brief (pp. 52-53), the proposed mergers are presumptively illegal under the government's definition of the relevant geographic markets,

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[3]A similar contention was urged in *Citizens Publishing Company* v. *United States*, 394 U.S. 131, which held an arrangement eliminating all commercial competition between two newspapers to be illegal *per se* under the Sherman Act. Brief for Appellants, No. 243, O.T. 1968, pp. 38-41.

which the district court accepted for discussion. If the government prevails on this appeal, then appellees' challenge to those markets should be disposed of by the district court, which made no findings resolving the market dispute.[4]

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[4]In any event, the government's evidence, we submit, established the markets claimed. The testimony of the government's economic expert was based on, *inter alia*, a study of the location, by zip code, of every demand deposit account with balances of $1,000 or less in every office of every bank in Fulton and DeKalb Counties. Statement of Samuel Skogstad submitted in lieu of direct testimony, App. E-57 to E-88. Dr. Skogstad's conclusion was that considering the competitive interaction of the banking markets involved, the government's market areas were "reasonable geographic areas within which it is appropriate to analyze the competitive effects of the proposed mergers." App. E-83. In contrast, appellees' expert witness, Dr. Nevins Baxter, testified only that the five percent banks did not compete with each other or with any other bank outside a small service area of each bank, and that therefore there were no banking markets larger than the individual service area of any one bank. He reached this conclusion despite the fact that Dr. Baxter never considered non-C&S banks that compete with the defendants in determining the markets in which they operate (App. 658, 664-665) and under the erroneous assumption that the defendant banks did not compete with each other because of the pre-existing relationships (Economic Report, App. 862-863, 868).

This Court has never held that relevant markets in bank merger cases can or should be established merely by determining the service areas of a few of the banks operating in an area. The competitive interaction that occurs between spatially separated banks, ignored by Dr. Baxter, has been recognized by this Court in every bank merger case as essential to a proper market analysis. See, *e.g.*, *United States* v. *Connecticut National Bank*, No. 73-767, decided June 26, 1974, slip op., pp. 12-15.

Appellees' assertion that this is a potential competition case is also mistaken. Since the banks do not now compete, they argue, the mergers could affect only the potential for future competition. In fact, as the district court assumed "for purposes of discussion" and as the record shows, the five percent banks and C&S sell similar or identical services in the same geographic areas, a characteristic which ordinarily results in a merger case being denominated "horizontal" (GXs 104-105, App. E-57 to E-112; GXs 42-75, not printed).[5] Here, but for the combination in restraint of trade, C&S and the five percent banks would be legally and factually independent actual competitors.

Under appellees' analysis every acquisition consolidating a pre-existing cartel arrangement among direct competitors would have to be treated as a potential competition case, since by definition the parties' violation of the Sherman Act has eliminated actual competition. Although such a violation of the Sherman Act does not establish a violation of Section 7 of the Clayton Act, illegal agreements to eliminate competition among direct competitors are not a defense under the Clayton Act. Appellees concede as much when they state (Br., p. 77, n. 73) that "[a] refusal to compete is not a proper defense to a challenge to a merger * * * ." Yet, inconsistently, they also claim (Br., p. 71) that even if their past conduct violated Section 1 and is enjoined, the freezing of their cartel arrangement into permanent form through merger does not violate Section 7, because barring the merger will not "result in substantial competition between C&S and the sponsored banks."

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[5]GXs 42-75 are a statistical analysis, based on the zip codes of demand account customers with deposits under $1,000, showing the areas from which the banks draw the bulk of their business.

Whether the individual banks will emerge as substantial strong competitors after their illegal cartel has been enjoined, however, is not the question under Section 7. That statute protects competition, not competitors. *Brown Shoe Corp.* v. *United States,* 370 U.S. 294, 320. Section 7 is intended to preserve a competitive market structure which leaves to the economics of the free market the determination of the quality and the level of competition by individual firms. *Ibid.*

Appellees contend that because the five percent banks do not now make independent business decisions, there is no possibility that their merger with C&S will lessen competition (Br., pp. 71-72). In this view, the fact that competition has been previously eliminated by an agreement which violates Section 1 of the Sherman Act is irrelevant. Section 7, however, is intended to foreclose anticompetitive relationships in their incipiency, before they amount to actual Sherman Act violations. See *e.g., United States* v. *E.I. duPont de Nemours & Co.,* 353 U.S. 586, 597; cf. *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 318. It is unsound, therefore, to suggest that because competition among legally independent entities has been previously eliminated by a fullblown agreement in restraint of trade, the violators may rely on this restraint to escape the prohibitions of Section 7.

United States v. *TransTexas Bancorp.,* CCH 1972 Trade Cases, par. 74, 257 (W.D. Tex), affirmed, 412 U.S. 946, is not to the contrary. Despite appellees' description of the district court's decision in that case, the court's actual holding was that there was a single entity, described as a "control group," which owned a majority of the stock in each bank. Thus, the district court there found that the banks separately "lacked competitive capabilities" (1972 Trade Cases at p. 93,213). In this case, however, it is undisputed that each five percent bank has the competitive capability, both legally and factually, to make its own independent, business decisions.

3. There is no merit to the appellees' claims that the relationships of three of the five percent banks with C&S have been validated by the "grandfather" provision in Section 11(d) of the Bank Holding Company Act, 80 Stat. 240, 12 U.S.C. 1849(d), and that the five percent banks are "subsidiaries" within the meaning of the third paragraph of Section 7 of the Clayton Act, 15 U.S.C. 18.

A. Section 1849(d) provides that "[a]ny acquisition, merger, or consolidation of the kind described in section 1842(a) of this title," with respect to which the Attorney General had not initiated litigation prior to July 1, 1966 "shall be conclusively presumed not to have been in violation of any antitrust laws" other than Section 2 of the Sherman Act. Section 1842(a)(3) makes it unlawful, without prior approval of the Federal Reserve Board, for any bank holding company, *inter alia*, "to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank."[6] The purpose of the grandfather

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[6]12 U.S.C. 1842(a) provides in pertinent part:

It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company.

provision is to bar an antitrust attack upon such acquisitions if the Attorney General had not challenged them prior to July 1, 1966.

The government in this suit is not alleging that C&S's acquisition of a 5 percent stock interest in the suburban banks itself violated either Section 1 of the Sherman Act or Section 7 of the Clayton Act. Rather, its contention is that the relationships between C&S and the 5 percent banks, by which all competition between them was eliminated, violated Section 1 of the Sherman Act and that the acquisition by C&S of the remaining stock in those banks would violate Section 7 of the Clayton Act.

Since Section 1849(d) bars antitrust challenges only to an "acquisition * * * of the kind described in section 1842(a)," Section 1849(d) is inapplicable to this case. Indeed, if appellees are correct in their argument that the "grandfather" provision of the Bank Holding Company Act immunizes the relationships between C&S and three of the 5 percent banks, this would be tantamount to a confession that they had violated Section 1842(a). For that section makes it "unlawful, except with the prior approval of the Board," to make any of the acquisitions there covered, and C&S never sought or obtained from the Board its prior approval before acquiring 5 percent of the stock of those banks.

B. The five percent banks are not "subsidiaries" of C&S within the meaning of the third paragraph of Section 7,[7] which makes that section inapplicable to the formation

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[7]That paragraph provides (15 U.S.C. 18):

> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

of or holding of stock in "subsidiary corporations." Appellees correctly state that neither court decisions nor the legislative history of the Clayton Act are helpful in determining the meaning of this provision. The normal meaning of "subsidiary" is a company in which another company owns at least a majority of its voting stock,[8] and there is nothing to indicate that Congress used the word here in other than its usual sense.

Indeed, in view of the purpose of the Clayton Act of barring mergers that may substantially lessen competition, the obvious purpose of the "subsidiary" exemption was to cover the situation where, because of the legal control that one corporation has over another, the acquisition of the latter by the former would not basically alter the existing competitive situation. Normally, a corporation and its majority-owned subsidiary are not expected to and do not compete with each other.

If Congress had intended to exempt from the prohibition of Section 7 of the Clayton Act any acquisition in which the acquiring firm had practical "control" over the ac-

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[8] *Webster's Third New International Dictionary* (1959) defines a subsidiary company as a "company wholly controlled by another that owns more than half of its voting stock." *Black's Law Dictionary* (rev. 4th ed. 1968), defines a subsidiary corporation as "[o]ne in which another corporation owns at least a majority of the shares, and thus, has control."

quired firm by something other than majority stock control, it presumably would have so provided, as it has done in other federal statutes.[9]

CONCLUSION

For the reasons stated in the government's main brief and this reply brief, the judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[9]See *e.g.*, Section 2(d) of the Bank Holding Company Act, as amended, 12 U.S.C. U.S.C. 1841(d), (direct or indirect control of 25 percent of the stock of the bank); Section 2(a)(8)(A) of the Public Utility Holding Company Act, 15 U.S.C. 79b(a)(8)(A), (direct or indirect control of 10 percent or more of the outstanding voting securities of a public utility company); Sections 2(a)(1)(H) and 2(a)(1)(J)(2), of the 1968 Amendments to the Savings and Loan Holding Company Act, 82 Stat. 6-7, 12 U.S.C. 1730a(a)(1)(H) and (J)(2) (25 percent of voting stock of insured savings and loan company).